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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 957

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner, Hollywood Baseball Association, owned and operated a minor league baseball team as a member of the Pacific Coast League. During the taxable year ending October 31, 1958, and many prior taxable years, petitioner received substantial revenue from (1) the playing of baseball games and (2) the sale of baseball player contracts. Prior to the taxable year here in question, petitioner had consistently reported the proceeds from sales of baseball player contracts as ordinary income. Petitioner was liquidated during 1958 and claimed that $117,000 derived from the sale of eight player contracts was not subject to federal income tax under the provisions of § 337 of the Internal Revenue Code of 1954. (Pet. 18.)

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Section 337(a) provides for the nonrecognition of gain or loss from the sale or exchange of property by a corporation during the twelve-month period between adoption and execution of a plan of complete liquidation. Section 337(b)(1)(A) specifically excludes from the nonrecognition provisions of § 337(a) gains or losses from sales of "property held by the corporation primarily for sale to customers in the ordinary course of its trade or business." This exclusion from nonrecognition of gain is virtually identical to the exclusion from capital gain treatment contained in § 1221(1) of the Code.[1]

The Tax Court recognized the relationship between § 337(b)(1)(A) and § 1221(1), and also recognized that the purpose for which petitioner held the player contracts was a factual question (Pet. 28). It carefully examined the many rules and agreements governing organized baseball and concluded that one of the important roles of minor league teams in the overall structure of organized baseball was the development of baseball players and the ultimate sale of their contracts (Pet. 30–31). Specifically, with regard to this taxpayer, the Tax Court found that during the ten years prior to 1958 over $800,000 of revenue was derived from the sale of 224 player contracts. The Tax Court also found that these sales had yielded approximately $100,000 of income during the period

[1] Section 1221 provides:

> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> (1) * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *

here in question, which, when compared to the $280,000 of other income earned during this period, demonstrated that the sales of player contracts had been one of the significant sources of petitioner's income from the operation of its business (Pet. 31). Accordingly, on the basis of this and other evidence, the Tax Court held that the sale of player contracts was a vital part of petitioner's everyday business and that the proceeds of such sales were neither entitled to preferential capital gain treatment in nonliquidation years nor nonrecognition treatment in the year of liquidation (Pet. 31–33).

The Court of Appeals for the Ninth Circuit agreed with the Tax Court that if one of the substantial or essential purposes for holding property is for sale in the ordinary course of a taxpayer's business, such property is held primarily for sale to customers in the ordinary course of business within the meaning of § 337(b)(1)(A) and § 1221(1). In so holding, the Court recognized that the question is largely a factual one and that the Tax Court decision was amply supported by the evidence. (Pet. 35–36.)

Petitioner argues that both courts erred in their determination because they applied incorrect legal criteria. It contends that as used in the relevant statutory provision the term "primarily" means "chief" or "principal." Thus, in petitioner's view the fact (found by both courts) that it was in the business of selling player contracts and that one of the essential or substantial purposes for holding the contracts in question was for sale to customers in the ordinary course of that business is irrelevant (Pet. 11).

As petitioner points out (Pet. 11, 15), the question presented by its petition for certiorari is essentially the same as that awaiting argument before this Court in *Malat* v. *Riddell,* No. 487, this term, certiorari granted November 8, 1965 (382 U.S. 900)—namely, the meaning of the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," appearing in § 1221 (1) of the 1954 Code and carried over into § 337(b) (1)(A). The decision below is in accord with that of the Ninth Circuit in *Malat* (347 F. 2d 23), and, we submit, is correct for the reasons set forth in our brief in the *Malat* case. Although we believe further review by this Court is neither necessary nor appropriate, the Court may wish to defer action on the petition pending its disposition of *Malat.*[3]

Respectfully submitted.

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[3] In view of its conclusion that the property in question was held "primarily for sale" in the ordinary course of petitioner's business, both the Tax Court and the court of appeals deemed it unnecessary to pass on alternative grounds for sustaining the Commissioner's deficiency determination on this issue (Pet. 27, 32–33, 36). Accordingly, even if the petition were granted and the decision below reversed, a remand for consideration of the Commissioner's alternative contentions would be appropriate.

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